regard to the pleadings, the evidence adduced and the facts and circumstance of the case, and applying the principles of law stated above, the said paragraph 14 of the amended counterclaim cannot, in my view, be said to disclose no reasonable cause of action or is frivolous and vexatious or is an abuse of the process of the Court. Nor ought the inherent jurisdiction of the Court be exercised to strike it out as sought.

I wish to make clear that in coming to the above conclusion, no consideration has been given to paragraph 14.5 of Encik Chundang's written submission which, or a substantial part of it, was not based on any pleading or evidence and should not, therefore, have been adduced.

For the plaintiff, it was contended that though the plaintiff's application for striking out paragraph 14 of the amended counterclaim was dismissed by the learned Deputy Registrar, costs of application should not have been wholly awarded against the plaintiff since the plaintiff had succeeded in striking out paragraph 15 of the defendant's amended defence and amended counterclaim. With respect, I am unable to agree. About 2 months prior to the hearing before the Deputy Register, the defendant had indicated that it would abandon the said paragraph 15 (see paragraph 9 of Ong Seh Bee's affidavit affirmed on 3 September 1992). The plaintiff could have accepted that and dropped the remaining relief thereby shortening the hearing. As it turned out, the proceedings on the actual hearing of the application in November 1992 were substantially on the striking out of the said paragraph 14. This is borne out in the written submissions of Counsel for the parties and the ruling appealed against. Accordingly the award of cost to the defendant by the learned Deputy Registrar cannot be said to be unjustified.

For the reasons given above, the appeal is dismissed with cost to be taxed, if not agreed, and paid by the appellant/plaintiff to the respondent/defendant. The award of cost by the learned Deputy Registrar on 17 December 1992 is affirmed.

**CONFIDENCE CONCRETE SDN. BHD.**

**v.**

**SHIMIZU-PEREMBA SDN. BHD.**

HIGH COURT, KUCHING
DATO' HJ ABDUL KADIR SULAIMAN J.
[SUIT NO. KG. 26 OF 1990]
27 DECEMBER 1993

***PRACTICE & PROCEDURE: Application to dismiss suit for want of prosecution - Principles applicable - Summons for directions taken out - Order to set down for trial - Failure to give notice of trial - Failure to set down for trial within the prescribed time - Whether mandatory - Lapse of more than 4 years from date of order to set down suit for trial - Whether inordinate and inexcusable delay - Whether delay intentional and contumelious - Whether defendant prejudiced - No action taken by defendant on their counterclaim - Whether delay by defendant in pursuing their counterclaim precludes the Court from hearing this application - Whether the defendant's counterclaim can be dismissed without formal application by the plaintiff - Whether the power of the Court to dismiss an action for want of prosecution ought to be exercised where the delay does not extend beyond the limitation period for the cause of action - Consideration of O. 25 r. 1(4), O. 34 rr. 2(2), 7, 7A(2), 8(1) Rules of the High Court 1980.***

***TORT: Professional negligence - Negligence of plaintiff's solicitor and solicitor's assistant - Whether plaintiff responsible for negligence of their solicitors.***

The defendants filed an application on 17 July 1993 to dismiss the plaintiffs' action for want of prosecution pursuant to O. 25 r. 1(4), O. 34 r. 8(1) of the Rules of the High Court 1980 (RHC) and under the inherent jurisdiction of the Court.

The application arose from a writ of summons No. S5-23-7-88 instituted by the plaintiffs in the civil division of the High Court at Kuala Lumpur for alleged breach of contract for the supply of batching concrete by the plaintiffs as sub-contractor to the defendants who were the main contractors. It was alleged in the statement of claim that the defendants had terminated the said contract by a letter dated 7 April 1987 for which the plaintiffs claimed special damages of RM258,662.14, general damages, interest and other relief. The writ was issued on 7 January 1988 and the defendants filed their defence and counterclaim on 21 June 1988. Records indicated that the plaintiffs filed their reply and defence to counterclaim on 12 May 1988 i.e.

before the defendants' defence and counterclaim was filed. Be that as it may, the defendants had on 10 March 1988 already applied for transfer of the suit to the High Court at Kuching on the ground that the cause of action, if any, arose in Kuching, Sarawak. The application was heard on 8 June 1989 and an order was granted for the transfer but the case docket was only transmitted to the Kuching High Court by the learned Senior Assistant Registrar of the Civil Division, High Court Kuala Lumpur in late January 1990 along with a letter dated 23 January 1990 a copy of which was extended to the solicitors for both parties. The docket reached the Kuching High Court registry on 1 February 1990. An identical application to transfer the suit to the Kuching High Court was filed by the defendants on 29 July 1988. The said application was heard on 27 November 1989 but was struck off in the absence of both parties. On 19 December 1988 the plaintiffs applied for summons for directions pursuant to O. 25 of the RHC. The matter came up for disposal on 16 March 1989 where it was ordered that the suit be set down for trial within 60 days which expired on 26 May 1989. At the time of expiry no order for the transfer of the suit to Kuching had yet been made but the plaintiffs failed to set the suit down for trial as ordered which failure extended up to the date of this application.

**Held:**

**[1]** Order 25 r. 1(4) of the RHC concerned the failure on the part of a plaintiff to take out a summons for directions. As a summons for directions had been taken out in this case the question of the Court exercising its power of dismissal under O. 25 r. 1(4) of the RHC would not arise. In the circumstances the application under this head was disallowed.

**[2]** The defendants had cited O. 34 r. 8(1) of the RHC as a basis for their application being the plaintiffs' failure to give notice of trial within the time prescribed. The notice of trial was within the confines of O. 34 r. 7 of the RHC which had nothing to do with an order setting down an action for trial which was within the confines of O. 25 and O. 34 r. 2(2) of the RHC. **Mallal's Supreme Court Practice,** 2nd Edn., at p. 413 in relation to O. 34 r. 2(1) of the RHC had this to say: "An order for setting down an action for trial is a necessary item in a summons for directions which itself is a mandatory step to be taken. Notice of trial (rule 7 of the Order) is therefore unnecessary." What was really necessary was compliance with the order made upon a summons for directions under O. 25 of the RHC. Failure to do so in the case of an order for setting down the suit for trial would attract O. 34 r. 2(2) and not O. 34 r. 8(1) of the RHC.

**[3]** The Court on hearing an application to dismiss a suit for want of prosecution may order that the action or suit be dismissed or make such order as it thinks just. The law on this is clear. A plaintiff's action is liable to be dismissed for want of prosecution when the Court is satisfied that (a) the plaintiff's default has been intentional and contumelious; or (b) the plaintiff or his lawyer is guilty of such inordinate and inexcusable delay that the defendant has been prejudiced by it.

**[4]** In the present case the delay for a period of over 4 years since the order made in 1989 could mean nothing but inordinate. Unless a credible excuse was made out by the plaintiffs the delay was inexcusable.

**[5]** Indirectly the plaintiffs were trying to lay the blame on the Kuala Lumpur High Court for the delay in transmitting the case docket to the Kuching High Court thereby causing the plaintiffs to delay in setting down the suit for trial as ordered on 16 March 1989. A period of 60 days was given to set down the suit for trial. During this period the suit was still with the Kuala Lumpur High Court Registry for the order to transfer was not yet made but the plaintiffs failed to comply with the time frame. No explanation was given for this. If the reason for not setting down the suit in Kuala Lumpur was that there was a pending application for transfer how then could the plaintiffs' affidavit verifying list of documents affirmed on 8 August 1989 and list of documents dated 6 July 1989 have been filed at the Kuala Lumpur High Court Registry when by that time the order for transfer had been made on 8 June 1989. Placing the blame on the delay and confusion in getting the file transferred to Kuching was a lame excuse for the delay in setting down the suit for trial.

**[6]** The plaintiffs explained that the delay was also created by confusion when the Court informed them by letter dated 10 January 1990 that their suit had been struck off due to the absence of the parties. This was in relation to the defendants' second application to transfer the suit to Kuching. The plaintiffs made no

effort to file an application to set aside the order striking off the suit nor to set down the suit for trial and neither was any action taken by the plaintiffs upon their discovery from a file search conducted on 24 August 1991 that the file had been transferred to Kuching. Accordingly a credible excuse was not made out by the plaintiffs for the inordinate delay.

**[7]** The failure on the part of the defendants to affirmatively state as to why and how they would be prejudiced was not fatal to their application. It was for the plaintiffs when faced with such an application by the defendants to give a credible excuse for the delay as otherwise the natural inference would be that it was inexcusable. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial. There was much prejudice to the defendants in having the suit against them hanging over their heads indefinitely, not knowing when it was going to be brought to trial.

**[8]** From the evidence the inference was that the plaintiffs' default had been intentional and contumelious. The excuses given were weak. There were ample opportunities for the plaintiffs to comply with the Court order made on the summons for directions. Although the defendants could succeed on this ground alone the suit ought also to be dismissed on the ground of inordinate and inexcusable delay on the part of the plaintiffs.

**[9]** The Court could not refuse the defendants' application on the sole ground that the defendants had a counterclaim and had delayed in pursuing the counterclaim. Unless there was an application by the defendants with regard to the plaintiffs's claim or an application by the plaintiffs with regard to the defendants' counterclaim the Court could not exercise its power under O. 34 r. 2(2) of the RHC to dismiss the action of the plaintiffs or the defendants as the case may be, for want of prosecution.

**[10]** Other than in a case of contumelious conduct on the part of the plaintiffs the power of the Court to dismiss an action for want of prosecution should not be exercised where the delay had not extended beyond the end of the limitation period for the cause of action. This was so because so long as the plaintiffs were within the limitation period after the dismissal of the suit by the Court there was nothing to prevent the plaintiffs from filing a fresh suit against the defendants.

**[11]** The plaintiffs were responsible for the negligence of their lawyers. Plaintiff's solicitors who did not "get on" with their cases would be at risk of having the plaintiff's action dismissed for want of prosecution and themselves rendered liable for negligence to their own client.

**[12]** In exercise of the Court's discretion the application of the defendants was allowed and the plaintiff's action was accordingly dismissed for want of prosecution. The costs of and occasioned by this application was ordered to be taxed unless otherwise agreed to be paid by the plaintiffs to the defendants.

*[Application allowed with costs].*

**Cases referred to:**
*Toh Hock Thye & Ors. v. Toh Chwee Biow [1982] 1 MLJ 152, FC* ***(cit)***
*Vasudevan v. Damodaran & Anor. [1981] 2 MLJ 150 at 151* ***(refd)***
*Allen v. Sir Alfred McAlphine & Sons Ltd. [1968] 2 QBD 299* ***(refd)***
*Zimmer Orthopaedic Ltd. v. Zimmer Manufacturing Co. [1968] 3 All ER 449* ***(dist)***

**Legislation referred to:**
Rules of the High Court 1980, O. 25 r. 1(4), O. 34 rr. 2(1), 2(2), 7, 7(A), 8(1)

**Other sources referred to:**
**White Book 1979,** Vol. 1 pp. 431 & 432
**Mallal's Supreme Court Practice,** 2nd Edn. p. 413

*For the plaintiffs: Paul Tang; M/s. Tan & Yap*
*For the defendants: Loretta Lau; M/s. Ibrahim & Co.*

## JUDGMENT

**Haji Abdul Kadir Bin Sulaiman J:**

*Introduction:*

This is an application by the defendants to dismiss the plaintiffs' action for want of prosecution pursuant to O. 25 r. 1(4), O. 34 r. 8(1) of the Rules of the High Court 1980 (RHC) and under the inherent jurisdiction of the Court. The Court has an inherent jurisdiction to dismiss an action for want of prosecution where there is default in compliance with an order of the Court or where the plaintiff is guilty of excessive delay in the prosecution of the action (see **White Book 1979,** Vol. 1 at p. 431).

The application arose out of a writ of summons taken out by the plaintiffs in the Civil Division, High Court of Malaya at Kuala Lumpur and registered as Suit No. S5-23-7 of 1988 for alleged

breach of contract for the supply of batching concrete by the plaintiffs as sub-contractor to the defendants as the main contractor. The plaintiffs claim special damages amounting to RM258,662.14, general damages, interest and other relief. It was alleged in the statement of claim that the defendants terminated the said contract *vide* letter dated 7 April 1987. The writ was issued on 7 January 1988 i.e. 7 months after the breach by the defendants and the defendants filed their defence and counterclaim on 21 June 1988. Surprisingly, records indicate that the plaintiffs filed their reply and defence to counterclaim on 12 May 1988 i.e. before the defendants' defence and counterclaim were filed. Be that as it may, on 10 March 1988, that is prior to the filing of the defendants' defence, the defendants had by way of summons in chambers already applied for the suit to be transferred to the High Court of Borneo at Kuching on the ground that the cause of action, if any, arose in Kuching, Sarawak. The said application was heard on 8 June 1989 and by a Court order of the same date, the suit was ordered to be transferred to the High Court here. However, it was only in late January 1990 that the learned Senior Assistant Registrar, Civil Division, High Court Kuala Lumpur transmitted the case docket to the High Court at Kuching along with a letter dated 23 January 1990 a copy of which was extended to the solicitors for both the parties. The docket reached the Kuching High Court registry on 1 February 1990. Notwithstanding the defendants' application for the transfer of the suit to the Kuching High Court made on 10 March 1988, the defendants made an identical application to the High Court at Kuala Lumpur for the transfer of the suit to Kuching by summons in chambers dated 29 July 1988. This second application came up for disposal in the Kuala Lumpur High Court on 27 November 1989 but as both parties were absent, the matter was struck off. On 19 December 1988 i.e. before the order for the transfer of the case to Kuching made on 8 June 1989, the plaintiffs applied to the Kuala Lumpur High Court for summons for directions under O. 25 of the RHC. The matter came up for disposal on 16 March 1989 where the Court ordered that the suit be set down for trial within 60 days which expired on 26 May 1989. It is to be noted that by the date of expiration no order for the transfer of the suit to Kuching had yet been made. However the plaintiffs had not set the suit down for trial as ordered despite the lapse of more than 4 years from the date of the defendants' application. It is based on this ground that the defendants invited the Court to exercise its discretion to have the suit dismissed for want of prosecution.

*The issues:*

Before going further to determine the matter, I wish to dispose off part of the matter contained in the application of the defendants herein. The defendants have prayed that this suit be dismissed for want of prosecution in contravention of O. 25 r. 1(4) of the RHC. This order concerns the failure on the part of a plaintiff to take out a summons for directions. As a summons for directions has been taken out in this case, the question of the Court exercising its power of dismissal under O. 25 r. 1(4) of the RHC does not arise and in the circumstances the application under this head is disallowed.

The defendants also prayed for the Court to dismiss this action under O. 34 r. 8(1) of the RHC, the reason being that the plaintiffs had failed to give notice of trial within the time prescribed. The affidavit of Anthony G.C. Bong, Counsel for the defendants, affirmed on 17 July 1993 states the facts leading to the application and at paragraphs 15 and 16 state as follows:

> 15. Up to date the plaintiffs had not set the suit down for trial within the sixty (60) days as ordered pursuant to Court order dated 16 March 1989. The plaintiffs accordingly had failed to set the suit down for trial pursuant to O. 34 r. 2 of the Rules of the High Court 1980.
>
> 16. That for the reasons mentioned, I verily believed that the plaintiffs' inaction amounts to an abuse of the process of the Court and had delayed the fair trial of this action.

The complaint of the defendants is that up to date the plaintiffs have not set down the suit for trial as ordered pursuant to the summons for directions. Order 34 r. 2(2) of the RHC, *inter alia*, states that where the plaintiff does not within the period fixed, set the action down for trial, the defendant may apply to the Court to dismiss the action for want of prosecution. The affidavit goes on to state in effect that by the plaintiffs' failure to set down the suit for trial as ordered, the plaintiffs have failed to comply with O. 34 r. 2 of the RHC which in this case is O. 34 r. 2(2) as mentioned above. However, prayer (c) of the defendants' summons in chambers cites O. 34 r. 8(1) of the RHC as a basis for the application being the plaintiffs' failure to

give notice of trial within the time prescribed. The notice of trial is within the confines of O. 34 r. 7 of the RHC which has nothing to do with an order setting down an action for trial which is within the confines of O. 25 and O. 34 r. 2(2) of the RHC. **Mallal's Supreme Court Practice**, 2nd Edn., at p. 413 in relation to O. 34 r. 2(1) has this to say: "An order for setting down an action for trial is a necessary item in a summons for directions which itself is a mandatory step to be taken. Notice of trial (rule 7 of the Order) is therefore unnecessary." When dealing with O. 34 r. 7, the learned author has this to say: "An order for setting down is necessarily to be applied for in a summons for directions under O. 25 ... Notice of trial is therefore unnecessary." Therefore it is clear that what is really necessary is compliance with the order made upon a summons for directions under O. 25 of the RHC. Failure to do so in the case of an order for setting down the suit for trial would attract O. 34 r. 2(2) and not O. 34 r. 8(1) of the RHC.

Now, I come back to the issue of delay on the part of the plaintiffs to set down the suit for trial as ordered by the Court on 16 March 1989 and the application by the defendants to have the suit dismissed for want of prosecution. The Court on hearing such an application, may order that the action or suit be dismissed or make such order as it thinks just (O. 34 r. 2(2) of the RHC). The law on this is clear. A plaintiff's action is liable to be dismissed for want of prosecution when the Court is satisfied that

(a) the plaintiff's default has been intentional and contumelious; or
(b) the plaintiff or his lawyer is guilty of such inordinate and inexcusable delay that the defendant has been prejudiced by it (see *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 MLJ 152, FC).

In this case, the delay has been for a period of over 4 years since the order made in 1989. *Prima facie,* the delay can mean nothing but inordinate. So unless a credible excuse is made out by the plaintiffs, the delay is inexcusable. The suit has been hanging over the defendants' head for that length of time. Had the move not been made by the defendants by this application, it is not known how much longer it would have been. It is the plaintiffs who made the allegations against the defendants in the suit but after doing so they went into a deep slumber. On the part of the Court the suit remains in the statistics. This, when added together with the suits of other similar plaintiffs will cause a backlog of cases which in the eyes of those concerned is not at all welcome. The image of the judiciary is at stake due to these indolent plaintiffs. Now, have the plaintiffs by their evidence made out a credible excuse for their delay in not having the suit set down for trial as required by the order made on the summons for directions?

The plaintiffs' explanation as to the delay is contained in the affidavit in reply of Paramjit Singh, the solicitor alleged to be having conduct of the matter, affirmed on 25 November 1993. What appears from the said affidavit is that the matter was in the hands of his assistant who had gone to London on the Commonwealth Student Exchange programme for a period of six months. About six months after her return she resigned from the firm without giving the deponent a status report on the matter and it was not until this present application that he called up the file for review. Thus the blame is to some extent placed on his assistant. In my judgment and in the light of authorities, this cannot be a credible excuse at all or otherwise plaintiffs will always seek to escape by laying the blame on their solicitors particularly in this case where the blame is further shifted to a solicitor who has left the firm. Plaintiffs are responsible for the negligence of their lawyers. Plaintiff's solicitors who do not "get on" with their cases will be at risk of having the plaintiff's action dismissed for want of prosecution and themselves rendered liable for negligence to their own client (see **White Book 1979** at p. 432).

At paragraph 3 of the said affidavit in reply, the plaintiffs aver that although the defendants obtained an order on 8 June 1989 to transfer the suit to Kuching there was delay and confusion when the file was being transferred out of the Kuala Lumpur High Court. This the plaintiffs say was beyond their control. Indirectly, the plaintiffs are trying to lay the blame on the Kuala Lumpur High Court for the delay in transmitting the case docket to the Kuching High Court thereby causing the plaintiffs to delay the setting down of the suit for trial as ordered. The order for the setting down was made on 16 March 1989 and a period of 60 days was given to do so. During this period the suit was still with the Kuala Lumpur High Court Registry for the order for its transfer had not been obtained. The plaintiffs did not comply

with the time frame and no explanation was given for this. If the reason was that there was a pending application for transfer and therefore the plaintiffs could not have set it down for trial in Kuala Lumpur, how then could their affidavit verifying list of documents affirmed on 8 August 1989 and list of documents dated 6 July 1989 have been filed at the Kuala Lumpur High Court Registry when by that time the order of transfer had been made on 8 June 1989. Placing the blame on the delay and confusion in getting the file transferred to Kuching is a lame excuse for the delay in setting down the suit for trial.

Another explanation by the plaintiffs is that confusion was created when they were informed by the Court vide letter dated 10 January 1990 that their suit had been struck off due to the absence of the parties. This was in relation to the defendants' second application to have the suit transferred to Kuching. Notwithstanding this, on receipt of the information, what steps did the plaintiffs take as regards the striking off? No effort was made to file an application to have the order set aside. Instead, on 30 January 1990, the plaintiffs' solicitors wrote to Court to say that they were unaware of the hearing and they requested the Court to immediately transfer the suit to Kuching. This letter is not in the records. If received it might be lying somewhere for the docket was sent to Kuching together with a letter dated 23 January 1990 and it was not until 1 February 1990 that the case docket was received in Kuching. Not having set down the suit for trial and not having taken any steps to have the order striking off the suit set aside, the plaintiffs conducted a file search on 24 August 1991 and discovered that the file had been transferred to Kuching. Now, knowing this, why was the setting down still not done? If this was done, albeit a little late, the defendants' present application would not have been filed. Accordingly, I hold that a credible excuse has not been made out by the plaintiffs for the inordinate delay.

The learned Counsel for the plaintiffs in his submission while conceding that the Court may exercise its discretion to have the suit dismissed if the default has been intentional and contumelious, or that there has been inordinate and inexcusable delay on the part of the plaintiffs or their lawyers and such delay gives rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiffs or between each other or between them and a third party, went on to attack the defendants' application by saying that the grounds relied upon by the defendants was not in accordance with established principles for such an application. Learned Counsel based his argument on paragraph 16 of the defendants' affidavit which states: "That for the reasons mentioned, I verily believe that the plaintiffs' inaction amounts to an abuse of the process of the Court and has delayed the fair trial of this action." The learned Counsel submitted that the grounds stated by the defendants are not based on principles or grounds that would give the Court the discretion to dismiss. He further submitted that the defendants have failed to show the Court why and how such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either between themselves and the plaintiffs or between each other or between them and a third party. Further, the defendants have failed to show that their application is based on the plaintiffs' intentional and contumelious default.

I see no merit in the submissions so made. In their summons in chambers the defendants pray for an order that the action be dismissed for want of prosecution as the plaintiffs have failed to set down the action for trial within the time allowed. The affidavit in support states that the failure on the part of the plaintiffs in taking the appropriate action is an abuse of the Court and is delaying the fair trial of this action. Paragraph 15 of the affidavit states: "Up to date the plaintiffs had not set the suit down for trial within sixty (60) days as ordered pursuant to Court Order dated 16 March 1989. The plaintiffs accordingly had failed to set the suit down for trial in pursuant to O. 34 r. 2 of the High Court Rules 1980." On this basis, the Court has the jurisdiction under O. 34 r. 2(2) of the RHC to determine in the exercise of its discretion whether or not to dismiss the plaintiffs' suit for want of prosecution. No doubt the defendant have not shown in their affidavit why or how such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either between themselves and the plaintiffs or

between each other or between them and a third party. Nevertheless, in *Vasudevan v. Damodaran & Anor.* [1981] 2 MLJ 150, Abdoolcader J, in delivering the judgment of the then Federal Court said at page 151:

> We would specifically refer to the propositions enunciated by Salmon LJ in Allen (at page 268) to the effect *inter alia* in relation to the inordinate delay being inexcusable that as a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable, and again with regard to the question of serious prejudice to the defendants by the delay, that there may be prejudice at the trial of the issue between themselves and the plaintiff or between each other or between themselves and third parties, and that as a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

Further down his Lordship went on to say:

> We would draw particular attention to the judgment of Lord Denning MR, stating (at page 389) that prejudice to the defendant by a plaintiff's delay is not limited to the death or disappearance of witnesses or their fading memories or in the loss or destruction of records since there is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial.

For my part, I would add that in as much as a defendant in an action is prejudiced in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial, public policy and the administration of justice would not condone the action of a plaintiff who is indolent thereby stalling the speedy disposal of the action. If everyone involved complies with the rules laid down we would not be talking of backlog of cases in Court. When a plaintiff files a suit against a defendant, his action adds to the volume of cases to be disposed off by the Court. If by his inaction to follow the rules or orders made he allows himself to slumber and other plaintiffs adopt the same approach, then the backlog of cases in Court will not be reduced. A time has come when the Court must be firm on this issue so as to avoid the problem faced. It cannot be said that by being firm the Court is carrying out hurried justice for justice delayed is justice denied. Based on *Vasudevan's* case, I would say that the failure on the part of the defendants to affirmatively state as to why and how they would be prejudiced is not fatal to their application. No one would argue that 4 years delay in setting down the suit for trial is not inordinate. That being the case, it is for the plaintiffs when faced with such an application by the defendants to give a credible excuse as otherwise the natural inference would be that it is inexcusable.

On the issue of serious prejudice to the defendants, as a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial. Had it not been for the defendants in this case waking the plaintiffs from their slumber, the suit would remain in the Court's record until such time the Court exercises its discretion under O. 34 r. 7A(2) of the RHC. On the issue that the defendants had failed to show that their application is based on the plaintiffs' intentional and contumelious default, I am satisfied from the evidence before me that the plaintiffs' default has been intentional and contumelious. The excuses given are weak. There were ample opportunities for the plaintiffs to comply with the Court order made on the summons for directions rather than to complain of the alleged delay and confusion caused by the Court. At any rate, why was no action taken albeit late, after the discovery on 24 August 1991 that the matter was already with the Kuching High Court? The fault, if any, committed by the legal assistant of the plaintiffs' solicitor's firm is no excuse at all for the delay. The plaintiffs in resisting the defendants' application at paragraph 13 aver that their claim discloses a reasonable cause of action and is not an abuse of the process of the Court. If that be so, why the delay in prosecuting the action? Just because the plaintiffs feel that they have a reasonable cause of action against the defendants, can they with impunity be allowed to cause the defendants to suffer with the action hanging over their heads and to ask the Court to wait until such time they are ready to awaken from their slumber? For the reasons stated I am satisfied that the defendants would succeed on this ground alone in their application to have the plaintiffs' action dismissed for want of prosecution for their failure to set down the suit for trial as ordered by the Court. If I am wrong in holding that the plaintiffs' default has been intentional and contumelious, the suit ought also to be dismissed on the ground of inordinate and inexcusable delay on the part of the plaintiffs.

In *Allen v. Sir Alfred McAlphine & Sons Ltd.* [1968] 2 QB 299, quoted in *Vasudevan's* case, supra, it was held that other than in a case of

contumelious conduct on the plaintiff's part, the power of the Court to dismiss an action for want of prosecution should not be exercised where the delay had not extended beyond the end of the limitation period for the cause of action. This is so because so long as the plaintiff is within the limitation period, there is nothing to prevent the plaintiff from filing a fresh suit against the defendant after a dismissal by the Court. In this case, the cause of action as alleged in the statement of claim accrued in April 1987. The period of limitation in this case is six years. By the time the defendants' summons in chambers was filed on 19 July 1993, the six years period had lapsed but the plaintiffs had not set the action down for trial as ordered. Thus the exception mentioned in *Allen's* case, supra, would not apply.

During the submissions, learned Counsel for the plaintiffs further contended that the defendants cannot complain of the delay caused by the plaintiffs as the defendants have a counterclaim against them. Under the head of special damages, the plaintiffs claim for the sum of RM255,982.14 whereas the defendants by way of counterclaim are claiming for RM1,529,700. Admittedly the defendants did nothing to pursue the matter of their counterclaim and in the course of her submissions, the learned Counsel for the defendants indicated that the defendants wished to proceed with the counterclaim against the plaintiffs. The plaintiffs, on the other hand, have chosen not to apply to the Court to have the counterclaim dismissed for want of prosecution. In support of his contention learned Counsel for the plaintiffs cited the case of *Zimmer Orthopaedic Ltd. v. Zimmer Manufacturing Co.* [1968] 3 All ER 449. However, in *Zimmer's* case, the facts were slightly different in that the plaintiffs and the defendants there applied to the Court to have the claim and the counterclaim dismissed for want of prosecution. The Court of Appeal, varying the order of the Court below, ordered the dismissal of both the claim and the counterclaim as both parties were to blame for the delay. The learned Counsel for the plaintiffs submitted that what is important is that the defendants having filed a counterclaim and being in a position to prosecute the action cannot complain of the delay. The short answer to that is that on the facts *Zimmer's* case can be easily distinguished. On an application by a defendant to have the claim of a plaintiff dismissed for want of prosecution under O. 34 r. 2(2) of the RHC, the Court cannot refuse the application of the defendant on the ground that the defendant has a counterclaim and has delayed in pursuing the counterclaim when the plaintiff has not made as application to have the counterclaim dismissed. Order 34 r. 2(2) of the RHC gives the power to the Court to dismiss the action of a plaintiff for want of prosecution on the application of a defendant where the plaintiff does not within the time fixed, set the action down for trial. For the purpose of O. 34 r. 2(2) a defendant is also a plaintiff in relation to its counterclaim against the plaintiff. So, unless there is an application by a defendant with regard to the plaintiff's claim or an application by a plaintiff with regard to the defendant's counterclaim the Court cannot exercise its power under O. 34 r. 2(2) of the RHC to dismiss the action of the plaintiff or the defendant as the case may be, for want of prosecution. In the case before me now there is no application by the plaintiffs to have the defendants' counterclaim dismissed for want of prosecution so the Court acting under O. 34 r. 2(2) of the RHC cannot dismiss the counterclaim. Just because the Court cannot do so, does not mean that the Court cannot act under O. 34 r. 2(2) on the application of the defendants to dismiss the action of the plaintiffs, provided there are sufficient grounds, simply because the defendants have delayed in prosecuting their counterclaim. On that ground I see no merit in the submission of learned Counsel for the plaintiffs.

*Conclusion:*

I am satisfied that, if the plaintiffs are not guilty of intentional and contumelious conduct, they are no doubt guilty of inordinate and inexcusable delay causing much prejudice to the defendants in having the action hanging over their heads. While these proceedings were going on the plaintiffs on 8 December 1993 filed in a notification for setting down the action for trial. This to my mind is too late to defeat the defendants application. In the circumstances and in the exercise of my discretion I allow the defendants' application and accordingly dismiss the plaintiffs' action for want of prosecution. I also order that the costs of and occasioned by this application be taxed unless agreed, to be paid by the plaintiffs to the defendants.